Supreme Court, U.S.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

Michael Leroy Dolihite, individually and as father and next friend of David Michael Dolihite, and Joyce Mary Dolihite, individually,

Petitioners,

vs.

Royce King, et al.,

Respondents.

APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. May the Eleventh Circuit Court of Appeal in contravention of this court's decision in *Johnson v. Jones,* 115 S.Ct. 2151, 132 L.Ed.2d 238(1995) take jurisdiction over non-final decisions of the district court in qualified immunity cases; and can the appellate court invoke pendent appellate jurisdiction and substitute its own evidentiary determinations on the sufficiency of the evidence?

II. Does the "bright line" test a plaintiff is required to meet by the Eleventh Circuit decision in *Lassiter v. Alabama A&M University, Board of Trustees,* 28 F.3d 1146 (1994) in order to overcome a claim of qualified immunity by a government official exceed the scope of *Harlow v. Fitzgerald,* 457 U.S. 800 and *Mitchell v. Forsyth,* 472 U.S. 511?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT 8

I. CAN THE ELEVENTH CIRCUIT COURT OF APPEALS IN CONTRAVENTION TO THIS COURT'S DECISION IN *JOHNSON V. JONES*, 115 S.CT. 2151, 132 L.ED.2d 238 (1995) UNDERTAKE TO REVIEW NON FINAL DECISIONS OF THE DISTRICT COURT; INVOKE PENDENT APPELLATE JURISDICTION AND SUBSTITUTE ITS OWN EVIDENTIARY DETERMINATIONS ON THE SUFFICIENCY OF THE EVIDENCE? 8

A. Whether the court erred as a matter of law in exercising jurisdiction over the decision of thedistrict court as to Jenkins, Maughon, King, Poundstone, Dykes, Jurls, McBride since they appealed only on the questions of weather the record presented a genuine issue of material fact as to the evidence upon which to base qualified immunity? 10

B. Whether the court erred as a matter of law in exercising pendent appellate jurisdiction to consider the sufficiency of the evidence before the trial court where this Court has specifically held that appellate courts do not have jurisdiction to consider sufficiency

TABLE OF CONTENTS (Continued)

Page

of the evidence issues on appeal from the denial of a motion for summary judgment based on a claim of qualified immunity? 13

C. Whether this Court erred as a matter of law in exercising pendent appellate jurisdiction to consider the sufficiency of Plaintiffs' expert affidavits where the trial court relied upon Plaintiffs' expert affidavits and implicitly found them to be competent and sufficient evidence to create a question of fact regarding whether defendants failed to exercise professional standards in violation of David Dolihite's constitutional rights under clearly established law and where there were no compelling reasons or exceptional circumstances to warrant the exercise of pendent appellate jurisdiction, if such jurisdiction even exists? 16

D. Whether the Eleventh Circuit Court of Appeals erred as a matter of law and has created inconsistent and contrary precedent in this circuit by exercising pendent appellate jurisdiction to consider the sufficiency of the evidence before the trial court in the instant case and in *Johnson v. Clifton,* ___ F.3d ___, 1996 WL 28783 (11th Cir. (Fla.)), but has declined to exercise pendent appellate jurisdiction in other qualified immunity cases after *Johnson v. Jones,* such as *Heggs v. Grant,* 73 F.3d 317 (11th Cir. 1996), *Mastroianni v. Bowers,* ___ F.3d ___, 1996 WL 17032 (11th Cir. (Ga.), Jan. 5, 1996) and *Babb v. Lake City Community College,* 66 F.3d 270 (11th Cir.1995)? 18

TABLE OF CONTENTS

Page

II. DOES THE "BRIGHT LINE" TEST A PLAINTIFF IS REQUIRED TO MEET BY THE ELEVENTH CIRCUIT DECISION OF *LASSITER V. ALABAMA A&M* IN ORDER TO OVERCOME QUALIFIED IMMUNITY BY A GOVERNMENT OFFICIAL EXCEED THE SCOPE AND INTENT OF THIS COURT'S DECISIONS OF *HARLOW* AND *MITCHELL*? 22

CONCLUSION 28

APPENDIX A A-1

APPENDIX B A-3

APPENDIX C A-4

APPENDIX D A-55

APPENDIX E A-7

APPENDIX F A-36

APPENDIX G A-38

TABLE OF AUTHORITIES

Cases: *Page*

Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987) 19, 20, 26, 27

Babb v. Lake City Community College, 66 F.3d 270 (11th Cir. 1995) 18, 21

Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir. 1989) 23

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 546, 69 S.Ct. 1221,1221, 93 L.Ed. 1528 (1949) 5, 9

Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323-24 (11th Cir. 1989) 22

Dolihite v. Maughon, by and through Videon, 74 F.3d. 1027 (C.A. 11 (Ala.) 1996) 1, 3, 17, 19, 21, 26

Dolihite v. Maughon, by and through Videon, 847 F. Supp. 918, (M.D. 1994) 1

Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) 25

Greason v. Kemp, 891 F.2d .829 (11th Cir., 1990) 24

Hale v. Tallapoosa Co., 50 F.3d. 1579 (11th Cir., 1995) 22

Harlow v. Fitzgerald, 457 U.S. 800 ..... i, 22, 27

Harris v. Thigpen, 941 F.2d. 1495, 1504 (11th Cir., 1991) 25

Heggs v. Grant, 73 F.3d 317 (11th Cir. 1996) 18, 21

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Howell v. Evans, 922 F.2d. 712, (11th Cir., 1991), vacated as moot, 931 F.2d. 711(11th Cir.), reinstated by unpublished order as noted, 12 F.3d. 190 (11th Cir., 1994) 24

Johnson v. Clifton, F.3d , 1996 WL 28783 (11th Cir. (Fla.) 18, 19, 20

Johnson v. Jones, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) ..... i, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17, 18, 19, 20

Lassiter v. Alabama A&M University, Board of Trustees, 28 F.3d 1146 (1994) ..... i, 19, 21

Mastroianni v. Bowers, ___ F.3d ___, 1996 WL 17032 (11th Cir. (Ga.), Jan. 5, 1996) 18, 21

Mitchell v. Forsyth, 472 U.S. 511 ..... i, 19, 22

Natale v. Ridgefield, 927 F.2d 101, 104 (C.A. 2 1991) 14

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994) 24

Rogers v. Evans, 792 F.2d. 1052 (11th Cir., 1986) 24

Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980) 11

Servants of the Paraclete, Inc. v. Great American Insurance Co., 866 F.Supp. 1560, (D. New Mexico 1994) 17

Swint v. Chambers County Commission, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) 8, 9, 12, 13, 14, 19, 20

Waldrop v. Evans, 871 F.2d 1030 (11th Cir., 1989) 24

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co., 909 F.2d 259, 262 (C.A.7 1990) 14

Youngberg v. Romeo, 457 U.S. 307, 736 L.Ed.2d 28, 102 S.Ct. 2452 ..... 7, 11, 25

CONSTITUTIONAL PROVISIONS

U.S.C.A. Const. Amend. VIII 1, 7, 24, 25, 26

U.S.C.A. Const. Amend XIV 1, 25

FEDERAL STATUTES

42 U.S.C.A. § 1983 ..... 1, 4

28 U.S.C. § 1291 ..... 5, 9

28 U.S.C. § 2072 14

TREATISES

9 Moore's Federal Practice ¶110.01 9

OPINIONS BELOW

The majority and dissenting opinions of the United States District Court are published at 847 F. Supp. 918, (M.D. Ala. 1994). The majority and dissenting opinions of the United States District Court for the Eleventh Circuit are published at 74 F.3d. 1027 (C.A. 11 (Ala.) 1996).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered an order on March 21, 1996 denying Petitions for Rehearing and Plaintiffs' Suggestion of Rehearing En Banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case is the Fourteenth Amendment and the Eighth Amendment to the United States Constitution. The statutory provisions are 42 U.S.C.A. § 1983.

STATEMENT OF THE CASE

On January 13, 1992, David Dolihite was involuntarily civilly committed to Eufaula Adolescent Center, a state run mental health facility operated by the State of Alabama Department of Mental Health and Mental Retardation. At the time of his admission David had a family history of suicide and a personal history of suicidal attempts, gestures and ideation. Ten days after his arrival at Eufaula, David was evaluated by a treatment team. His suicidal ideation was considered by his treatment team to be his number one problem. He was prescribed a thirty minute therapy session once weekly and one forty-five minute weekly group session. While in the institution David was beaten, abused, confined in a bare concrete

jail cell with no heat and deprived of adequate medical treatment for his suicidal condition.

While a patient at Eufaula, there were numerous incidents by David of self mutilation, suicide threats and attempts. Compounding his serious psychological problems were problems of mistreatment and abuse that were constant in the facility. David was harassed, assaulted, abused and intimidated by staff, other residents and gangs which existed at the center. Further he was subjected to inhumane seclusion practices.[1] The supervisory staff knew of the beatings, the abuse and the dangerous and impermissible methods of seclusion and restraint used at the facility.[2]

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[1] Evidence was presented that David was secluded in a bare jail cell with a concrete floor, concrete block walls, no heat, a grate over the top of it with a light shining through the grate and a two-by-four that was put in front of the door with u-bolts to hold it in place.

[2] *See Appendix G,* Among the evidence of abuse and neglect was a memorandum to defendants King, Poundstone, and Dykes by the mental health advocate who was employed by the Department of Mental Health. This memo was sent on February 10,1992 while David was a patient at Eufaula and just six weeks before his final suicide attempt appears in the record. It is quoted here only in part:

I am writing to bring to your attention again our concerns about the Eufaula Adolescent Center. As you know, we have reported over the years several concerns regarding clinical practices and other treatments of this population as follows: - use of handcuffs, commonly referred to as hard restraints; - use of mace; - placing two or more adolescents in time-out and seclusion rooms together; - lack of supervision of adolescents placed in time-out; and - inappropriate use of time-out and seclusion.

Now, in the last week, we have received several investigative reports from BSI and the Facility Advocate that again exemplify our concerns about practices in this facility. While many of these reports date back several months, they reveal the following: - use of fire extinguishers and fire hoses instead of mace; - adolescents sodomizing each other while in time-out unknowing to staff; - adolescents sodomizing each other during bathing, bed time, etc., again unknowing to staff.

(continued . . .)

On March 22, 1996, after 70 days in the facility, David made an unsuccessful attempt to hang himself. This attempt was documented but no counseling or treatment was provided. On March 24, 1992, David again attempted to hang himself. On this occasion his attempt resulted in near death and severe, permanent hypoxic brain injury.

(continued . . .)

To ensure your understanding of the situations and practices I have described, I am enclosing copies of these confidential investigations for your review: Advocacy Case No. 011-0067; BSI Case Nos. M2-8127-91, M2-8078-91, and M2-7786-91. Please know that these are just a few examples. I urge you to read these reports in their entirety along with related correspondence.

As an Internal Advocacy Program, we have utilized every strategy available to us to bring about needed changes in these areas. The Department has even hired experts to advise on the Eufaula situation and to make recommendations.

Thus, as our final step in addressing problems in this facility, I am asking you to intervene immediately and take necessary steps to bring about the needed changes in the physical plant, clinical approach, etc. The recommendations of the Experts need to be obtained and immediately put into action. I cannot impress upon you the disservice to those placed in this facility for mental health care and treatment, not to mention the vulnerable and liability situation the Department faces with these non-therapeutic practices.

Should we receive additional reports of this nature, we will forward them to you for review. Please know that I am more than happy to discuss this situation with you at your convenience.

This document was withheld by the Alabama Department of Mental Health in discovery. It was subsequently discovered in another case and was before the appeal court in a motion to supplement the record filed in January of 1995 and was before the court at the time of oral argument.

Further evidence of abuse acknowledged by the appeal court included a child thrown down the stairs by a staff member, a child kicked in the ribs by a resident, a child being hit in the face by a staff member, threatening to beat a child, a child secluded as a means of punishment, a mental health worker hitting a resident in the mouth and a staff member cursing at a child. *Dolihite v. Maughon, by and through Videon, 74 F.3d. 1027 (C.A. 11 (Ala.) 1996).*

As a result of the failure of the staff of the Eufaula Adolescent Center and the Alabama Department of Mental Health to provide for David's safety and essential medical needs this action was brought pursuant to 42 U.S.C.A. § 1983. Plaintiff named as defendants, King, the Commissioner of the Alabama Department of Mental Health and Mental Retardation; Poundstone, the Associate Commissioner, responsible for the mental health facilities; Dykes, the director of the Eufaula Adolescent Center; Mazick, the Clinical Director of the Eufaula Adolescent Center; Dr. Maughon and Dr. Jenkins, the two contract psychiatrist assigned to the center; and McBride and Jurls, the two therapist assigned to David's case.

The lawsuit sought to address the incidents concerning David's inadequate medical care for his suicidal condition and also the continuum of constitutional violations resulting from the abuse and refusal by the administrative staff to redress the problems which persisted from the moment David arrived.[3]

Subsequent to discovery being taken the defendants filed motions for summary judgment based on qualified immunity. The District Court denied the motions as to all defendants. The court's twenty-two page opinion set forth in minute details the evidence presented of David's suicide attempts, his treatment for those attempts or lack thereof, the evidence of abuse to which David was subjected, the inhumane conditions under which the child

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[3] Pursuant to a request from the United States District Court to narrow and define the claims against the department personnel and to set forth the evidence that plaintiff had in support thereof plaintiff submitted the 30 page pleading attached as *Appendix C.* Said pleading sets out in detail each and every claim plaintiff alleged in particularity against each defendant and the evidence that plaintiff presented in support thereof.

was secluded, the failure of the administrative staff to take action to abate these conditions, all of which took place while David was under the care and custody of the State of Alabama. The evidence further detailed the failure of the upper level administrative staff of the Alabama Department of Mental Health and Retardation as well as the upper level staff of Eufaula to take appropriate action to correct the deplorable conditions at the center. The evidence documented the failure of the mental health commissioner and associate commissioner to address the problems which they knew existed at the center. The court carefully went over each of the facts as presented by the plaintiff and analyzed those facts in light of the clearly established law and what the evidence showed the defendants knew about the facts and law at the time of the incident made the basis of the lawsuit. This was not a case of the district court rendering a short terse opinion denying summary judgment with little or no discussion of the evidence. The evidence documented a long history of violence, abuse and inadequate response to serious medical needs of the children housed in the center, including the plaintiff. The facility administrators and staff had been put on notice of these problems for years and took no action concerning the serious constitutional violations.

The Defendants appealed the district court decision to the Eleventh Circuit Court of Appeal pursuant to 28 U.S.C. Section 1291 and the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546, 69 S.Ct. 1221,1221, 93 L.Ed. 1528 (1949).

The basis of Dr. Maughon and Dr. Jenkin's appeal was that there was no genuine issue of material fact presented as to whether they violated clearly established law. The clearly established law was not challenged by these

defendants.[4] King, Poundstone, Dykes, McBride and Jurls also appealed only on evidentiary grounds stating in their appeal that the record before the court did not establish that these defendants violated the constitutional rights of David Dolihite to reasonable conditions of safety and adequate medical care and that they were entitled therefore to qualified immunity.[5] Only Dr. Mazick appealed on a basis that there was no clearly established constitutional right. Mazick also appealed on the basis of the sufficiency of the evidence stating in his brief that the evidence was not sufficient to show a violation of the professional judgment standard and/or the deliberate indifference standard.

The Eleventh Circuit Court of Appeals accepted jurisdiction of the case as to all defendants and on January 23, 1996 reversed the decision of the district court as to all defendants with the exception of one social worker, Jurls. In direct contravention to this Court's opinion in *Johnson v. Jones*, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) the court ruled that it had jurisdiction to hear all issues as to all defendants under principals of pendent appellate jurisdiction and "core qualified immunity analysis." With respect to the defendants who had not challenged the constitutional question, the court on its own raised this question and in addition reviewed the sufficiency of the evidence dismissing on said review plaintiffs expert medical affidavits which had gone unchallenged by the defendants and had been determined admissible and competent by the district court. The court also reviewed, in detail, the findings of the district court on the suffi-

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[4] See *pages 10-11* of this writ which contains a quote of the question presented by the defendants, Maughon and Jenkins, in their brief to the court of appeals.

[5] See *pages 11-12* of this writ which contains a quote of question presented by these defendants.

ciency of the evidence presented by plaintiff against the other defendants and substituted its findings in all instances for those of the district court.

In making its determination as to whether there was clearly established law at the time of the incident, the court compared the actions of the defendants in the instant case to defendants sued under Eighth Amendment prison cases.[6] The court found that the actions of the mental health institution defendants in the instant case did not rise to the same level of "egregiousness" as that of defendants in the comparable prison cases. In so holding the court set the measure of proof required by this involuntarily civilly committed plaintiff as that of deliberate indifference to the serious medical needs of the child, a standard of proof greater than required by this Court for involuntarily civilly committed mental patients.

Finally in undertaking its "core qualified immunity analysis" the court micro analyzed the facts to the point that it held that officials, who worked at this state run facility and who knew David was being beaten and abused while at the facility and took no action to abate such abuse could not have been in violation of clearly established law since there was not sufficient evidence presented on how bad the violence and beatings were.

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[6] Plaintiff does not criticize that such a comparison may be made in an effort to determine if there is clearly established law only that the standard in Eighth Amendment cases is not the standard which would apply in mental health institution cases. It is however the Eighth Amendment deliberate indifference standard not the professional judgment standard required in *Youngberg v. Romeo*, 457 U.S. 307, 736 L.Ed.2d 28, 102 S.Ct. 2452, which was clearly applied in the instant case as made obvious from a review of the court's analysis.

ARGUMENT

I. CAN THE ELEVENTH CIRCUIT COURT OF APPEALS IN CONTRAVENTION TO THIS COURT'S DECISION IN *JOHNSON V. JONES*, 115 S.CT. 2151, 132 L.ED.2d 238 (1995) UNDERTAKE TO REVIEW NON FINAL DECISIONS OF THE DISTRICT COURT

In its opinion filed January 23, 1996 in the instant case, the Eleventh Circuit Court of Appeals questioned its jurisdiction, under this Court's recent decision in *Johnson v. Jones*, U. S. 2151, 132, to consider on appeal questions raised by the defendants of issues of fact found to exist by the trial court.[7] The Eleventh Circuit determined that regardless of the *Johnson* decision it had "pendent appellate jurisdiction" to reach factual determinations regarding the sufficiency of the evidence presented to the district court and determined by the district court to be sufficient to present a genuine issue of material fact in opposition to the motions for summary judgment.

The Eleventh Circuit Court of Appeals exceeded its limited statutory jurisdiction in holding that the decision of the district court on the fact questions raised by the defendants on appeal were final decisions within the meaning of the appellate jurisdiction statute and thus were immediately appealable. The court further exceeded its limited statutory jurisdiction in reaching sufficiency of the evidence issues. Additionally the court exceeded its jurisdiction as a matter of law in finding Plaintiffs' expert affidavits to be conclusory, in weighing the

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[7] The decision in *Johnson* was issued in June of 1995, after this case was appealed, and before a decision was rendered in this case. The jurisdictional issue was raised by plaintiff/appellant on a motion for rehearing and rehearing en banc.

credibility of witnesses and drawing inferences against the Plaintiffs from the evidence.

The United States Supreme Court's decisions in *Johnson v. Jones,* ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 32 Fed. R. Serv.3d 1 (June 12, 1995) and *Swint v. Chambers County Commission,* 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) leaves no question about the jurisdictional limits of the appeal courts where qualified immunity issues are raised. *Johnson* makes clear that the circuit courts do not have jurisdiction to review cases when the only question is whether the summary judgment record in qualified immunity cases raises a genuine issue of fact. The decision of this court with respect to the role of the appeals court fully supports Plaintiff's position that the court of appeal exceeded its limited statutory jurisdiction in determining the sufficiency of the evidence in this case. Professor Moore states in his treatise that court of appeals are "constitutional courts, and their jurisdiction is exclusively appellate." "Like other courts of the United States, the United States Courts of Appeals may exercise only such jurisdiction as is conferred upon them by statute." 9 Moore's Federal Practice ¶110.01. The specific grant of statutory jurisdiction in this case is pursuant to 28 U.S.C. § 1291 which grants appellate court jurisdiction to hear appeals only from "final decisions" of the district courts.[8] A trial court's determination whether facts exist to create a genuine issue of material fact is not a final decision within §1291 and is not appealable. An appeal from such a decision would be strictly interlocutory, and as stated in *Johnson,* interlocutory appeals "are the exception, not the rule." *Johnson v. Jones,* 115 S.Ct. at 2154. The Eleventh Circuit Court of Appeals thus accepted jurisdic-

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[8] The definition of a final decision was extended by judicial interpretation of this statute in *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949).

tion over parties who's summary judgment order rendered by the district court was non final. Further it's opinion extended to an overt review of whether facts were "genuine" for summary judgment purposes thus, violating the dictates of *Johnson v. Jones, supra.*

A. Whether the court erred as a matter of law in exercising jurisdiction over the decision of the district court as to Jenkins, Maughon, King, Poundstone, Dykes, Jurls, McBride since they appealed only on the questions of weather the record presented a genuine issue of material fact as to the evidence upon which to base qualified immunity?

It is apparent from a review of the appellant briefs of Maughon, Jenkins, King, Poundstone, Dykes, McBride that the basis upon which they appealed the decision of the district court was not on the constitutional issue of whether there was clearly established law of which a reasonable government official would know at the time of the incident but rather on the basis that the record did not sufficiently establish a basis in fact for denying qualified immunity.

Defendants Maughon and Jenkins plainly state in their brief to the Eleventh Circuit Court of Appeal that they do not question that the rights of David Dolihite were clearly established. The following are excerpts taken directly from their briefs:

Statement of the Issue

> "Whether the trial court erred in concluding that a genuine issue of material fact existed as to whether Drs. Maughon and Jenkin's conduct violated clearly established constitutional norms of which a reasonable person should have known." (Brief of Maughon and Jenkins at 1)

"[T]he only pertinent rights implicated by David's unfortunate attempt on his life are (1) his right to safety from himself, i.e. a right to prevention from carrying out his intent to kill himself, and (2) his right to treatment, i.e. his right to treatment such that he would have had no suicidal intent in the first place. These two rights, such as they exist in the constitutional sense, were clearly established by the U.S. Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982), adopting in pertinent part Chief Justice Seitz's special concurrence in *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir. 1980)" (Brief of defendants, Maughon and Jenkins, to Eleventh Cir. at page 26).

"[T]he district court correctly concluded that the professional judgment rule of Youngberg constituted the correct rule of law on the issue of the rights enjoyed by an involuntarily committed person." (Brief of defendants, Maughon and Jenkins, to Eleventh Cir. at page 29).

"While the defendants would not disagree that Youngberg controls, they would take issue with the district court's conclusion that a genuine issue of material fact exists as to their violation of any constitutional norms." (Brief of defendants, Maughon and Jenkins to Eleventh Cir. at page 30).

With respect to King, Poundstone, Dykes, McBride a review of their brief to the Eleventh Circuit also makes it clear that the only matters upon which they took issue with in the court's decision was that the evidence did not support the court's decision.

Statement of Issue Presented

"I. Does the record before the court establish that Defendants, King, Poundstone, Dykes,

> Jurls, and McBride, violated the constitutional rights of David Dolihite to reasonable condition of safety and adequate medical care?
>
> II. Are Defendants, King, Poundstone, Dykes, Jurls, and McBride entitled to qualified immunity?"
>
> "With these principles in mind, we now turn to a review of the evidence pertaining to David's stay at EACH. As explained in the sections that follow, these Defendants did not violate the constitutional rights of David Dolihite." (Brief of King, Poundstone, Dykes, McBride, Jurls at page 37).
>
> "The Supreme Court of the United States has established that individuals involuntarily confined to state facilities have a right to adequate medical care and a right to reasonable condition of safety Youngberg v. Romeo, 457 U.S. at 321-22, 324. The Youngberg standard is the standard the court should use in this case." (Brief of defendants, King, Poundstone, Dykes, McBride at 40.)

As clearly indicated above, seven of the eight defendants raised only the issue of a whether there was a genuine issue of material fact concerning the treatment of David and provisions for David's safety while in Eufaula Adolescent Center. A review of the briefs to the Eleventh Circuit Court of Appeals of these seven defendants never question if there was clearly established law. Thus, there was no abstract legal issues to be reviewed with respect to these defendants. Under this Court's decisions of *Johnson v. Jones*, supra and *Swint v. Chambers County*, supra. The Eleventh Circuit had no jurisdiction to hear the appeal of these seven defendants since the district court's decision was not final within the meaning of the appellate jurisdiction statute. *Johnson v. Jones.*

At the time the appeal in this case was initially taken the *Johnson* decision had not been rendered by this Court. It was rendered, however, prior to the time the Eleventh Court issued its opinion. The Court in fact considered the law set forth in *Johnson* when they wrote their opinion holding that they had jurisdiction. Had the Court followed this Court's ruling in *Johnson* it could not have accepted review of the case on behalf of Maughon, Jenkins, King, Poundstone, Dykes, or McBride and Jurls. By holding that they had pendent appellate jurisdiction over these defendants the Eleventh Circuit erred as a matter of law.

B. Whether the court erred as a matter of law in exercising pendent appellate jurisdiction to consider the sufficiency of the evidence before the trial court where this Court has specifically held that appellate courts do not have jurisdiction to consider sufficiency of the evidence issues on appeal from the denial of a motion for summary judgment based on a claim of qualified immunity?

The decisions in *Johnson* and *Swint* indicate a strong resistance by this Court to expand appellate jurisdiction by court decision. The so called "pendent appellate jurisdiction" sought to be exercised by a non-final, non-appealable order immediately appealable.

Appealable as an interlocutory appeal, without any statutory basis. The "pendent appellate jurisdiction" concept is precisely the kind of expansion of appellate jurisdiction by court decision that has been discredited by the Supreme Court. In fact, the Court's decision in *Johnson* clearly defined the limits of appellate jurisdiction to preclude the kind of review of the evidence that the Court unabashedly undertook in this case. "Pendent appellate jurisdiction" is not supported by statute or the rule mak-

ing process of 28 U.S.C. § 2072. It is purely a creature of judicial invention and Court decision, and its validity was questioned by the United States Supreme Court in both *Johnson* and *Swint*. This Court's application of "pendent appellate jurisdiction" allows the Court to limit by its discretion the holding in *Johnson*. *Johnson* was a case to limit appellate jurisdiction and eliminate discretion. The appeal court's exercise of "pendent appellate jurisdiction" in the instant case does violence to both principles.

In *Swint* this Court specifically held that pendent party appellate jurisdiction does not exist. In *Johnson* this Court alluded to the questionable concept of "pendent appellate jurisdiction" as follows:

> Even assuming, *for the sake of argument,* that it *may sometimes be appropriate to exercise "pendent appellate jurisdiction"* over such a matter, but cf. Swint v. Chambers County Comm'n, 514 U.S. ___, 115 S.Ct. 1203, 1211-1212, 131 L.Ed.2d 60, *it seems unlikely* that Courts of Appeals would do so **in a case where the appealable issue appears simply [as] a means to lead the court to review the underlying factual matter,** see, e.g., Natale v. Ridgefield, 927 F.2d 101, 104 (CA2 1991) (saying exercise of pendent appellate jurisdiction is proper only in "exceptional circumstances"); *United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co.,* 909 F.2d 259, 262 (CA7 1990) (saying exercise of such jurisdiction is proper only where there are "compelling reasons").

Johnson v. Jones, 115 S.Ct. at 2159.

The appeal court in this case violated every principle of this Court's admonition against the exercise of pendent appellate jurisdiction. The appeal court exploited the appealable issue, whether a "given set of facts" as found by the trial court violated clearly established law, to review and reweigh the underlying factual matter. The

court in this case did not attempt to articulate exceptional circumstances or a compelling reason for the exercise of pendent appellate jurisdiction, "assuming" that such jurisdiction is ever appropriate.[9] And even more astonishing, the court attempted to define a new area of appellate jurisdiction for itself based upon the concept of "core qualified immunity issues."

This Court impermissibly attempts to distinguish its definition of the "core qualified immunity issues" from factual issues held not appealable in *Johnson.* The *Johnson* Court did not define or in any way exempt its holding from cases involving "core qualified immunity issues." The Court did, however, instruct courts of appeals to take "as given" the facts that the district court assumed when it denied summary judgment. *Johnson,* 115 S.Ct. at 2159.

This case is not one in which the district court failed to find facts to support its denial of summary judgment. The district court found extensive facts and relied to a great extent on Plaintiffs' expert affidavits. This Court erred in engaging in a review of facts already found sufficient in the district court. *Johnson,* 115 S.Ct. 2151.

Pendent appellate jurisdiction violates the limited appellate jurisdiction of this Court, and as a matter of law could not have been a basis for the Court to reach factual issues in this case. The Court's detailed review of the evidence accepted by the trial court as sufficient to create questions of fact was beyond the court's jurisdiction; and the decision of the panel in this case is due to be reversed.

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[9] If one could find that there are exceptional cases where the evidence was not sufficiently excluded by the trial court to allow the appeal court to understand the basis of the factual determination that could be an exceptional circumstances however in the instant case the evidence basis of the decision was developed at great length.

C. Whether the court erred as a matter of law in exercising pendent appellate jurisdiction to consider the sufficiency of Plaintiffs' expert affidavits where the trial court relied upon Plaintiffs' expert affidavits and implicitly found them to be competent and sufficient evidence to create a question of fact regarding whether defendants failed to exercise professional standards in violation of David Dolihite's constitutional rights under clearly established law and where there were no compelling reasons or exceptional circumstances to warrant the exercise of pendent appellate jurisdiction, if such jurisdiction even exists?

The appeal court's finding that Plaintiffs' expert physician affidavits are conclusory and insufficient to create a question of fact as to the failure of the medical personnel treating David to meet even the most minimal professional standards and the failure to exercise professional judgment by defendants is nothing but a de novo review of the sufficiency of the evidence specifically relied upon by the district court. The court did not have jurisdiction to reach the issue of the sufficiency of Plaintiffs' expert affidavits. The sufficiency of Plaintiffs' expert affidavits was immaterial to a determination of whether given facts showed a violation of clearly established law. This Court was bound to accept as sufficient Plaintiffs' expert affidavits, and to determine based upon this evidence whether failure of mental health professionals to exercise their professional judgment was a violation of David Dolihite's constitutional rights under clearly established law.[10]

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[10] Even the headnote assigned by West to the court's consideration of Plaintiffs' expert affidavits is deemed an issue of "sufficiency of showing."

Although not central to the question of the court's jurisdiction, Plaintiffs strongly asserts that their expert affidavits were not conclusory as that term has been applied in the federal courts. A conclusory affidavit is one that improperly draws an inference from a fact. *Servants of the Paraclete, Inc. v. Great American Insurance Co.*, 866 F.Supp. 1560, (D. New Mexico 1994). While a witness cannot ordinarily testify as to his opinion or conclusions, an exception to this rule exists for "expert witnesses." Doctors Halpern, Hamilton and Issacson each testified by affidavit that Doctors Jenkins, Maughon, McBride and Mazick care of David did not rise to the level of even the most minimal professional standard of care for patients in David Dolihite's condition. Significantly, the court does not dispute the expert qualifications of any of Plaintiffs' experts.

In stating that Plaintiffs' expert affidavits were conclusory and of little assistance to the court, the court cites a decision in which it approved the trial court's order to strike the affidavit of the medical expert. *Dolihite v. Maughon, by and through Videon,* 74 F.3d 1027 (C.A. 11 (Ala.) 1996) at 39 n.33. Significantly, in the instant case, the Plaintiffs expert affidavits were not stricken by the trial court. In fact the trial court relied upon these affidavits and thus found them to be sufficient and competent to create a question of fact. This Court did not have jurisdiction to go behind the district court's findings on issues of the sufficiency of the evidence.

The court criticizes Plaintiffs' expert affidavits as not distinguishing between physicians, however, this confusion and any other "flaws" based upon a reading of the medical records goes to the weight and not the admissibility of the evidence.

This court not only exceeded its own appellate jurisdiction in considering the sufficiency of Plaintiffs' affidavits, it implicitly found that the trial court had abused its dis-

cretion in relying on the same affidavits. This court exceeded its jurisdiction and violated its scope of review in finding Plaintiffs' expert affidavits conclusory and insufficient.

The court's opinion also makes impermissible inferences from the evidence. For instance, the court concludes at page 33 that "the record indicates that the Eufaula staff could have treated David." This inference can only be based upon a determination of the facts in a light most favorable to the defendants. A reasonable inference taken in a light most favorable to the plaintiffs is that the Eufaula staff, in violating its own admission policy against admitting actively suicidal patients and failing to provide David with adequate medical care, was not prepared to care for patients like David who were actively suicidal. A fact-finder could reasonably conclude from the evidence that the Eufaula staff could not and did not adequately treat David's suicidal tendencies.

D. Whether the Eleventh Circuit Court of Appeals erred as a matter of law and has created inconsistent and contrary precedent in this circuit by exercising pendent appellate jurisdiction to consider the sufficiency of the evidence before the trial court in the instant case and in *Johnson v. Clifton*, ___ F.3d ___, 1996 WL 28783 (11th Cir. (Fla.)), but has declined to exercise pendent appellate jurisdiction in other qualified immunity cases after *Johnson v. Jones*, such as *Heggs v. Grant*, 73 F.3d 317 (11th Cir. 1996), *Mastroianni v. Bowers*, ___ F.3d ___, 1996 WL 17032 (11th Cir. (Ga.), Jan. 5, 1996) and *Babb v. Lake City Community College*, 66 F.3d 270 (11th Cir. 1995)?

The Eleventh Circuit, contrary to the express holding of *Johnson*, has decided cases post-*Johnson*, which are nothing short of a discretionary judicial expansion of this

court's appellate jurisdiction. Under the guise of the discretionary exercise of pendent appellate jurisdiction in cases involving a "core qualified immunity analysis," This Court has reviewed factual issues which were clearly not appealable and beyond the court's limited jurisdiction. *Dolihite, supra; Johnson v. Clifton, supra.*

The Court in *Johnson v. Clifton* reasoned as follows regarding the "core qualified immunity analysis":

> It seems clear to us that the Supreme Court was not changing the well-established law of qualified immunity in the context of summary judgment, [in *Johnson*] just elaborating on it. When faced with a motion for summary judgment based on qualified immunity, the district court must determine whether there is a genuine issue of material fact as to whether the defendant committed conduct that violated clearly established law. This analysis can be broken down into two parts. First, what was the official's conduct, based on the pleadings, depositions, and affidavits, when viewed in the light most favorable to the non-moving party? Second, could a reasonable public official have believed that such conduct was lawful based on clearly established law? The resolution of the second issue constitutes a final, collateral order. Mitchell [v. Forsyth, 472 U.S. 511] at 528, 105 S.Ct. at 2816-17 [(1985)]. A ruling on such an issue is immediately appealable. Id. When such a ruling is appealable, the first issue—the factual issue—may be addressed by an appellate court because it is a part of the core qualified immunity analysis. See Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987). However, if only the first issue is appealed, namely what conduct the defendant engaged in based on the evidence viewed in the

light most favorable to the plaintiff, and not the second issue, namely whether that conduct violated clearly established law, then the appellate court has no jurisdiction to hear the case. See Johnson, ___ U.S. at ___, 115 S.Ct. at 2159. The first issue—the factual issue—can only be heard because it is a necessary part of the core qualified immunity analysis, the resolution of which constitutes a final, collateral order; when the core qualified immunity issue is not appealed, then the factual issue may not be either. Id.

When the core qualified immunity issue is raised on appeal, the appellate court has two options regarding how to deal with the factual issue. "When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." Id. at ___, 115 S.Ct. at 2159. Or, the court of appeals can conduct its own review of the record in the light most favorable to the nonmoving party. First, the appellate court may have to do so because the trial court failed to state the facts it assumed. Id. Second, the appellate court can do so because such a determination is part of the core qualified immunity analysis, as discussed above. See Anderson, 483 U.S. at 641, 107 S.Ct. at 3039-40. Third, even if such a determination were not part of the core qualified immunity analysis, it would be "inextricably intertwined" with that analysis and within the appellate court's pendent jurisdiction. Swint v. Chambers County Com'n, ___ U.S. ___, ___, 115 S.Ct. 1203, 1209, 131 L.Ed.2d 60 (1995). See also Johnson, ___ U.S. at ___, 115 S.Ct. at 2159.

Johnson v. Clifton, 1996 WL 28783, at 2-3.

The court similarly reviewed its exercise of pendent appellate jurisdiction in the instant case, although without the specificity shown in *Johnson v. Clifton*. The court's reasoning is seriously flawed under the Supreme Court's decision in *Johnson v. Jones*. This Court in *Johnson v. Jones* anticipated appeal from mixed orders of law and fact and determined that courts would have to decide which portion of the orders were appealable and which were not. The court in this case failed to exercise its duty to decline the exercise of appellate jurisdiction over non-appealable orders of the district court regarding the sufficiency of the evidence.

The Eleventh Circuit Court of Appeals has rendered inconsistent decisions, and declined to exercise jurisdiction over non-appealable factual determinations in *Heggs*, *Mastroianni* and *Babb* ("[w]here, as in this case, a district court finds that there exists a genuine issue of material fact regarding the conduct claimed to violate clearly established law, there is no "final decision" and no interlocutory appellate jurisdiction under *Mitchell* to review the denial. An order determining the existence or nonexistence of a triable issue of fact—the sufficiency of the evidence—is not immediately appealable." *Babb*, 66 F.3d at 272.)

Thus the Eleventh Circuit Court of Appeals has created for itself an illegal and inconsistently applied discretionary appellate jurisdiction which this Court must address.

II. DOES THE "BRIGHT LINE" TEST A PLAINTIFF IS REQUIRED TO MEET BY THE ELEVENTH CIRCUIT DECISION OF *LASSITER V. ALABAMA A&M* IN ORDER TO OVERCOME QUALIFIED IMMUNITY BY A GOVERNMENT OFFICIAL EXCEED THE SCOPE AND INTENT OF THIS COURT'S DECISIONS OF *HARLOW* AND *MITCHELL*.

In arriving at a determination of whether clearly established law was violated in this case, the Eleventh Circuit reviewed the facts in light of a standard of deliberate indifference. The court stated in its analysis the allegations raised by the plaintiff of failure to abate violent and unsafe conditions, that an administrators' failure to abate violence and abuse may constitute deliberate indifference citing *Hale v. Tallapoosa County* 50 F.3d 1579 (11th Cir. 1995). The court noted that plaintiff had presented evidence that the defendants knew about the beatings of residents by staff and violence among other patients and that David had been the victim of such violence. The evidence, much of which was in statement and affidavit form from other patients and at least one former employee, chronicled the complaints made by patients to the defendants about the beatings. One affidavit mentioned specifically that defendant Mazick, the clinical director, was told about the violence and specifically told that David had been the victim of beatings. The affidavit stated that "all of the residents were being hit by staff members, including David, and lots of others." Even in the face of this compelling evidence the court held; "the evidence presented by the plaintiffs does not indicate that Dr. Mazick was apprised of an extent of violence and abuse which would have put him on notice that his failure to act in the face of such abuse and violence would rise to the level of a constitutional violation". *Dolihite* at 1054. The opinion went on to state that this "limited

information would not support a finding that violence and abuse were so rampant that failure to react would constitute a clearly established constitutional violation." *Id.*

How much tolerance of violence and abuse must there be allowed to be visited upon a mentally ill child at the hands of state officials before such tolerance rises to the level of a constitutional violation? Is it more than one beating? Is it two beatings? Is it ten beatings? Must there be a case that says that ten beatings of a mentally ill child in a state mental institution is the "bright line" to establish that a government official charged with abatement of violence know that his or her failure to take the necessary steps to attempt to stop the violence so rises to the level of a constitutional violation? Once the degree of violence is spelled out, must the manner in which it is meted out be the same in order for the official to know or have reason to know that his conduct in allowing such violence rises to the level of a constitutional violation? For example if the violence was ten beatings with a baton and there was no pre-existing case which held beatings with a baton a violation of clearly established law but caneing had been so held would there be immunity, since a reasonable governmental could not be expected under the pre-existing to law to know that beating with a baton was a clear violation of clearly established law since it had never been so held in a pre-existing case involving" like situated government officials in the same circumstances"? Under the rational of the *Lassiter*, supra, "bright line" test that would have to be the conclusion!

Lassister states :

> ("The *Harlow* decision sets up a bright-line test that is a powerful constraint on causes of action under section 1983.") *Lassister* at 1148 citing *Barts v. Joyner,* 865 F.2d 1187, 1190 (11th Cir. 1989);

> (when" no bright line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case . . . ") *Lassister* at 1149 citing *Dartland v. Metropolitan Dade County,* 866 F.2d 1321, 1323-24 (11th Cir. 1989)
>
> "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant". *Lassiter* at 1149 citing *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994)
>
> "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel . . . the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Lassiter* at 1150.

Expert evidence was presented that this child's medical treatment failed to meet the most minimal standard of professional judgment. Evidence was presented that this child was beaten by other patients and staff and that the director, commissioner, associate commissioner and the clinical director all of who were named defendants in the lawsuit knew of these situations.

In analyzing whether such lack of treatment and such abuse violated clearly established law, the Eleventh Circuit considered the facts of *Howell v. Evans,* 922 F.2d 712, (11th Cir. 1991), vacated as moot, 931 F.2d 711(11th Cir.), reinstated by unpublished order as noted, 12 F.3d 190 (11th Cir. 1994); *Greason v. Kemp,* 891 F.2d 829 (11th Cir. 1990); *Waldrop v. Evans,* 871 F.2d 1030 (11th Cir. 1989); *Rogers, v. Evans,* 792 F.2d 1052 (11th Cir. 1986), all cases involving the violation of the rights of prisoners under the Eighth Amendment of the United States Con-

stitution and all the cases considered by the district court. The district court, however, considered along with the facts of these cases that, the standard of proof was substantially less for the involuntarily mental ill child than for a convicted felon. The Eleventh Circuit made no such allowance. While at one point in the opinion the Eleventh Circuit acknowledges the language of *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 29 (1982) which states that the burden is less, the appeals court comparison of the prison cases to the immediate case made no allowance for this consideration.

> It is well settled that state governments possess "a constitutional obligation to provide minimally adequate medical care to those to whom they are punishing by incarceration." *Harris v. Thigpen* 941 F.2d. 1495, 1504 (11th Cir. 1991) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976)). If minimally adequate medical care is not provided, a plaintiff establishes an Eighth Amendment violation by proving that a defendant was "deliberately indifferent" to the plaintiff's serious medical needs. The Supreme Court has determined that persons who are subjected to involuntary civil commitment are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. *Youngberg v. Romeo.*

This Court in *Romeo* made it clear that the Fourteenth Amendment's due process requirement to care for those who have been civilly committed to state institutions are considerably more rigorous than those imposed under the Eighth Amendment. The Eleventh Circuit acknowledges this to be the standard but states in the Dolihite opinion that:

> All other circumstances being the same actions of a mental health professional which would violate a prisoner's Eighth Amendment rights would also violate the due process right of the involuntarily civilly committed. An official violates a prisoner's Eighth Amendment right when the focal is deliberately indifferent to the prisoners serious medical needs. *Dolihite v. Maughon, by and through Videon*, 74 F.3d. 1027 at 1041.

The Eleventh Circuit uses the Eighth Amendment cases to set forth the contours of the rights of David Dolihite. When they find that, in their opinion, the actions of the state actors in *Dolihite* are not as "egregious" as those in the Eighth Amendment cases they hold that there is no clearly established law.

No matter how self evident the constitutional right, the Eleventh Circuit requires there must first have been a case in the Eleventh Circuit that says that it is a right under the exact facts and circumstances presented. The obvious problem with that reasoning is that no individual can overcome a qualified immunity claim unless the precise facts under the precise conditions and the precise applicable law occurs. In other words, in almost any set of scenarios in the jurisdiction of the Eleventh Circuit one cannot overcome qualified immunity. There can be no violation of clearly established law because no first case can meet the test of having a preexisting case under the same set of facts and circumstance law and injury. There can be no first case because there has been no first case.

The Eleventh Circuit has used the term "bright line". This term was never used by this Court. While it is true that in *Anderson* this Court endeavored to make sure that public officials would not have to guess at what they might have to defend in the future the Eleventh Circuit has taken the qualified immunity test much further.

The history of qualified immunity is well known to this Court. The historic development of the immunity provisions have been set out at length in the cases of *Anderson v. Creighton*, 483 U.S. 635, 645, 107 S.Ct. 3034, 3042, 97 L.Ed.2d 523 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 296 (1982). It is important to note in all of those cases, that the point is made that qualified immunity is a balancing test. In the Eleventh Circuit it has lost all of its balance. Indeed there is essentially no more qualified immunity in the Eleventh Circuit. It is better termed unqualified immunity. The purpose of *Harlow* was to stem the tide insubstantial claims against government not to thwart the constitution.

The *Dolihite* opinion condones the abuse and neglect of children who are involuntarily under the custody and control of state officials and who actually have had the abuse and neglect visited upon by those very state officials who have taken them into custody in order to protect them. The Eleventh Circuit had to ignore many substantial legal principals to arrive at the opinion in this case. First it had to ignore this Court's opinion and take jurisdiction of the case as to seven of the eight defendants who had raised no constitutional issue. It then had to raise the constitutional issue for the seven defendants. Next it had to ignore the district court findings on the sufficiency of the evidence and substitute its own findings again going outside its jurisdiction. With respect to Mazick it had to ignore and deem insufficient expert affidavits which were deemed admissible and competent by the district court and unchallenged by the defendants. In circumventing all of these legal principles the Eleventh Circuit provided legal cover to state officials who engage and/or tolerate such activity. The decision in this case to grant David's doctors and these public officials qualified immunity is shocking to the conscience and should be reversed by this Honorable Court.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Eleventh Circuit should be reversed.

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Respectfully Submitted,

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